A

PP

v.

THAYALAN MANIAM

B

HIGH COURT MALAYA, SHAH ALAM
KN SEGARA J
[CRIMINAL REVISION NO: 43-2-2007]
16 FEBRUARY 2007

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Charge framed without chemist report before magistrate - Order by magistrate for remand of accused for two months pending availability of chemist report - Whether charge rendered baseless - Whether remand unlawful - Whether accused to be released -*
D *Dangerous Drugs Act 1952, ss. 31B, 39B(1)(a), (3), (4) - Criminal Procedure Code, ss. 29, 117, 254*

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's court - Trafficking in dangerous drugs - Order of remand for two months*
E *pending availability of chemist report - Whether remand unlawful - Whether magistrate can only order remand for a maximum of 15 days - Dangerous Drugs Act 1952, ss. 31B, 39B(1)(a) - Criminal Procedure Code, s. 117*

CRIMINAL PROCEDURE: *Charge - Trafficking in dangerous drugs*
F *- Charge framed by Deputy Public Prosecutor without chemist report - Whether charge could be framed first pending availability of chemist report - Dangerous Drugs Act 1952, s. 39B(3)*

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's court*
G *- Transfer of case - Trafficking in dangerous drugs - Whether consent of Public Prosecutor required - Dangerous Drugs Act 1952, ss. 39B(1)(a), 41A(1)*

CRIMINAL PROCEDURE: *Prosecution - Institution of prosecution -*
H *Whether prosecution instituted when accused is called upon to plead to charge - Whether consent of Public Prosecutor required - Interpretation of word "court" - Dangerous Drugs Act 1952, ss. 39B(1)(a), (3), (4), 41A(1)*

I

The accused was arrested and produced before the magistrate on a charge for trafficking in heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The Deputy Public Prosecutor ('DPP') framed the charge against the accused without the chemist report. He believed he had the authority to do so under s. 39B(3) DDA. The magistrate then made an order for remand for two months against the accused pending the availability of the said report. The issues were whether the DPP could frame the charge against the accused without the chemist report, and whether the order of remand for the two months was lawful.

Held:

(1) There is no provision in the DDA that enables the magistrate to remand an accused charged with an offence under s. 39B(1)(a) DDA for two months for the purpose of enabling the DPP to obtain a chemist report after the said charge has been framed, read and explained to the accused on his first appearance before the magistrate (after the expiry of his period in custody for investigations on the suspected trafficking charge for which he had been arrested and remanded in the first instance). A magistrate can only remand an accused for a maximum of 15 days under s. 31B DDA or s. 117 Criminal Procedure Code ('CPC') on the grounds that investigations cannot be completed pending a chemist report. (para 6)

(2) It is unlawful and unconscionable conduct for a DPP to frame a charge under s. 39B(1)(a) DDA without first studying a chemist report to ascertain the nature of the substance in the possession of the accused. (para 7)

(3) Section 41A(1) DDA does not mandate any consent of the Public Prosecutor ('PP') before a case is transmitted to the High Court. The magistrate need only satisfy himself that the PP has framed a charge against the accused for an offence under the DDA which is triable exclusively by the High Court and that the same has been read and explained to the accused without his plea taken. In only very rare and exceptional circumstances does the PP require a magistrate to transmit a case under s. 41A(1) DDA for an offence not

triable exclusively by the High Court (consistent with s. 41(2) DDA). In such instances, a written requisition of the PP must be produced to the magistrate before he transmits such a case to the High Court. (paras 8 & 9)

(4) A failure by the magistrate to transmit a case that has met all the pre-requisites under s. 41A(1) DDA to the High Court is irregular and incorrect in law. (para 10)

(5) The submission of the DPP was completely flawed because s. 39B(3) DDA, which he had alluded to, did not authorise any charge to be preferred first pending the availability of a chemist report. What the proviso to the said section permits is that a person arrested may be remanded (although not charged) notwithstanding that the consent of the PP has not been obtained. This is clearly intended to cover a situation where all investigations are completed (with the chemist report in the hands of the PP) but nevertheless the PP needs time to decide as to whether he should consent to prosecution under s. 39B(1)(a) DDA. (para 12)

(6) Section 39B(4) DDA provides for a situation when the accused is brought before a court charged for an offence under s. 39B(1)(a) DDA before the PP has consented to the prosecution. The charge shall then be read to him but he shall not be called upon to plead and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly. A prosecution is instituted only when the accused is called upon to plead to the charge *(Perumal v. Public Prosecutor)*. (paras 13 & 14)

(7) Magistrates should take note that in respect of an offence under s. 39B(1)(a) DDA an accused can only be called upon to plead to the charge at his trial in the High Court. At no stage should the DPP be heard to say that the chemist report is not available and yet frame a charge under s. 39B(1)(a) DDA. If the DPP finds himself in such an embarrassing situation in the High Court then he should unhesitatingly seek solace in the provisions of s. 254 CPC and inform the court that he declines to further prosecute the said charge. (paras 15 & 16)

(8) Section 41A(1) DDA should be read independently of s. 39B(3) and s. 39B(4) DDA. The word "Court" which without doubt is a reference to both High Court and subordinate court is used in s. 39B(4) DDA whereas in s. 41A(1) DDA the word used is "subordinate court". (paras 17 & 18)

(9) The DPP had framed a baseless charge when he was not in a position to determine an appropriate charge because investigations were incomplete by reason of the absence of a chemist report. In such an unequivocal situation, the magistrate should not transmit the case to the High Court under s. 41A DDA but instead release the accused under s. 29 CPC. It would be unlawful for the magistrate to remand the accused for two months or any other period to enable the DPP to obtain the chemist report, and only thereafter for the DPP to ascertain the "proper charge" against the accused. (paras 19 & 20)

(10) A magistrate should not appear to be acting in collusion with the DPP when making any order for remanding an accused person. The appearance of a senior DPP before a magistrate should not intimidate the magistrate. (para 20)

[Order of magistrate set aside; accused to be produced before magistrate and released under s. 29 Criminal Procedure Code.]

Case(s) referred to:
Perumal v. Public Prosecutor [1970] 2 MLJ 265 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 29, 117, 254, 323
Dangerous Drugs Act 1952, ss. 31B, 39B(1)(a), 39B(3), 39B(4), 41A(1), 41(2)

For the accused - Suraj Singh; M/s Suraj Singh & Co
For the prosecution - Nik Suhaimi Nik Sulaiman DPP
For the Selangor Bar Council - Rajpal Singh

Reported by Usha Thiagarajah

JUDGMENT

KN Segara J:

[1] A copy of the record of proceedings in Kes Jenayah: M3-81-2-2007 at the Magistrate's Court Petaling Jaya, together with a copy of the grounds of decision and a letter dated 31 January 2007 by the said magistrate with a request for revision, was received by the High Court Shah Alam on 2 February 2007.

[2] This revision fixed before me today is pursuant to the said request by the magistrate, in the exercise of my powers under ss. 31 and 35 of the Courts of Judicature Act 1964 as well as s. 323 Criminal Procedure Code.

[3] An examination of the record of proceedings, namely the charge sheet (courts 114), shows that the accused was arrested on 17 January 2007. The accused was produced before the magistrate (for all intents and purposes after the investigations were completed) on 29 January 2007 with a charge framed, signed and dated 29 January 2007 by the DPP Nik Suhaimi bin Nik Sulaiman, as follows:

PENDAKWA RAYA

LAWAN

THAYALAN A/L MANIAM

PERTUDUHAN

Kamu didakwa atas kehendak Pendakwa Raya dan pertuduhan terhadap kamu adalah:

Bahawa kamu pada 17 Januari 2007 jam lebih kurang 9.30 Malam di dalam Kedai Makanan dan Minuman USJ 2, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor telah memperedarkan dadah Berbahaya iaitu Heroin seberat 75.4 Gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Bertarikh pada 29 Januari 2007

Dengan kuasa yang diberi oleh Pendakwa Raya,

t.t.

...

(NIK SUHAIMI BIN NIK SULAIMAN)
Timbalan Pendakwa Raya
Selangor.

[4] The charge under s. 39B(1)(a) Dangerous Drugs Act 1952 (hereinafter referred to as DDA) is triable exclusively by the High Court.

[5] The notes of proceedings for 29 January 2007 before the magistrate shows that the magistrate acted correctly when she had the charge read and explained to the accused as required by s. 41A(1) DDA. Very correctly, too, no plea was taken from the accused after the charge was explained to him, as the magistrate has no jurisdiction to try the said offence. Unfortunately, what followed, thereafter, is in complete contravention of s. 41A(1) DDA, in that the magistrate did not transmit the case to the High Court, and instead remanded the accused for two months, until 29 March 2007.

[6] There is no provision in the DDA that enables the magistrate to remand an accused, charged with an offence under s. 39B(1)(a) DDA for two months, for the purpose of enabling the DPP to obtain a chemist report after the said charge has been framed, read and explained to the accused on his first appearance before the magistrate (after the expiry of his period in custody for investigations on the suspected trafficking charge for which he had been arrested and remanded, in the first instance). A magistrate can only remand an accused (for a maximum of 15 days and not 2 months) in proceedings under s. 31B DDA or s. 117 CPC on the grounds investigations cannot be completed, pending a chemist report as to the nature of the substance in the alleged possession of the suspect.

[7] It is unlawful and unconscionable conduct for a DPP to frame a charge under s. 39B(1)(a) DDA without first studying a chemist report to ascertain the nature of the substance in the possession of the accused. Prosecutors are to prosecute and not persecute!

[8] Section 41A(1) DDA does not mandate any consent of the Public Prosecutor to be produced before the magistrate as a condition precedent for the magistrate to transmit the case to the High Court. All that the magistrate has to do is satisfy himself that the Public Prosecutor has framed a charge against the accused for an offence under the DDA which is triable exclusively by the High Court and that the same has been read and explained to the accused without his plea taken. Thereafter, the magistrate must transmit the case to the High Court and cause the accused to appear before the High Court in order for the High Court to fix a date for his trial.

[9] It is only in very rare and exceptional circumstances that the Public Prosecutor may require a magistrate to transmit under s. 41A(1) DDA an offence which is not triable exclusively by the High Court (consistent with s. 41(2) DDA). It is only in such rare instance that the (written) requisition of the Public Prosecutor relating to the offence that is not triable exclusively by the High Court must be produced to the magistrate before he transmits such a case to the High Court.

[10] A failure by the magistrate to transmit a case, which has met all the pre-requisites (discussed above) under s. 41A(1) DDA, to the High Court, is irregular and incorrect in law.

[11] For ease of comprehension, the notes of proceedings before the magistrate, as well as her grounds of decision, is reproduced below:

Nota Keterangan

Koram : Pn. Maimoonah bt Aid

Tarikh : 29.1.2007

Timbalan Pendakwaraya : Nik Suhaimi bin Nik Sulaiman

Peguambela : En. Suraj Singh bagi OKT

OKT : Pertuduhan dibacakan, diterangkan dan fahami.

DPP : Puan, kehadiran saya bukan tujuan untuk kes dipindahkan ke Mahkamah Tinggi dibawah Seksyen 41B Akta Dadah Berbahaya 1952. Oleh yang demikian, saya pohon pertuduhan dibacakan.

OKT : Pertuduhan dibacakan, diterangkan dan fahami.

DPP : Pertuduhan telah dibacakan. Oleh sebab itu pohon tarikh Sebutan untuk menunggu izin daripada Pendakwaraya dibawah seksyen 41A Akta Dadah Berbahaya 1952.

Mahkamah : Kenapa kes ini tidak boleh dipindahkan ke Mahkamah Tinggi immediately?

DPP : Puan, kehadiran saya hari ini bukan untuk memindahkan kes. Ini adalah kerana di dalam kes ini Laporan Kimia belum diperolehi dan saya hadir pada hari ini kerana Undang-undang dibawah Seksyen 39B ADB 1952 membenarkan OKT dituduh dahulu kerana Laporan Kimia belum diperolehi. Dalam hal ini Laporan Kimia amat diperlukan dalam menentukan bidangkuasa Mahkamah mana yang harus mendengar kes ini.

Mahkamah : Setelah meneliti hujahan DPP dan mengambil kira kes-kes berikut:

1) PP v. Johar dan 3 orang

2) PP v. An Kee Cheng
PP v. Muhamad

3) PP v. Marwan bin Ismail

Mahkamah memutuskan untuk mengikut Penghakiman Datuk Zaharah Ibrahim.

29/3/2007 (Sebutan) izin DPP. OKT direman di Sg. Buloh. OTP.

t.t

Maimoonah bt Aid

Salinan Diakui Sah

t.t.
(Maimoonah bt Aid)
Majistret
Mahkamah Majistret
Petaling Jaya
Selangor Darul Ehsan.

Alasan Keputusan

Dengan izin Yang Arif,

1. Orang Yang Kena Tuduh di atas (selepas ini dirujuk sebagai "OKT") telah dituduh dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952.

2. Tiada izin dikemukakan untuk memindahkan kes ini ke Mahkamah Tinggi.

3. Pihak Timbalan Pendakwaraya yang diwakili oleh Tuan Nik Suhaimi bin Nik Sulaiman telah berhujah *inter alia* bahawa satu tarikh sebutan adalah diperlukan bagi mendapatkan izin kes ini dipindahkan ke Mahkamah Tinggi memandangkan laporan kimia belum diperolehi. Oleh yang demikian, sehingga laporan kimia diperolehi barulah dapat ditentukan Mahkamah mana yang mempunyai bidang kuasa mendengar kes tersebut.

4. Setelah mendengar hujahan tersebut dan mengambil kira Penghakiman-penghakiman di dalam kes-kes berikut:

(i) Pendakwaraya v. Toha & 3 yang lain,

(ii) Pendakwaraya v. An Kee Cheng
Pendakwaraya v. Muhammad dan

(iii) Pendakwaraya v. Marwan bin Ismail

Saya telah membuat keputusan untuk menggunapakai Penghakiman Datuk Zaharah Ibrahim di dalam kes (ii) di atas.

5. Namun, saya dengan rendah diri menyerahkan kepada Yang Arif Hakim untuk pertimbangan selanjutnya.

Keputusan pada : 30.01.2007
Peguambela : En Suraj Singh

Timbalan Pendakwaraya : Tuan Nik Suhaimi.

t.t

(Maimoonah bt Aid)
Majistret
Mahkamah Majistret
Petaling Jaya
Selangor Darul Ehsan.

The learned DPP submitted before the magistrate and I quote:

> Puan, kehadiran saya hari ini bukan untuk memindahkan kes ini. Laporan Kimia belum diperolehi dan saya hadir pada hari ini kerana Undang-undang dibawah Seksyen 39B ADB 1952 membenarkan OKT dituduh dahulu kerana laporan kimia belum diperolehi. Dalam hal ini Laporan Kimia amat diperlukan dalam menentukan bidang kuasa Mahkamah mana yang harus mendengar kes ini.

[12] The submission of the learned DPP is completely flawed, because s. 39B(3) DDA, which he has alluded to, does not authorise any charge to be preferred first pending the availability of a chemist report. What the proviso to s. 39B(3) DDA permits is that a person arrested may be remanded (although not charged) notwithstanding the consent of the Public Prosecutor to the institution of a prosecution has not been obtained. This is clearly intended to cover a situation where all the investigations have been completed (a *fortiori* the chemist report is also in the hands of the Public Prosecutor) but, nevertheless, the Public Prosecutor needs time to apply his mind personally as to whether he should consent to the institution of a prosecution for the offence under s. 39B(1)(a) DDA.

[13] Following upon the heels of s. 39B(3) DDA, s. 39B(4) DDA provides for a situation when the accused is brought before a court charged for an offence under s. 39B(1)(a) DDA (for example, before the High Court upon the case being transmitted under s. 41A DDA) before the Public Prosecutor has consented to the prosecution, then the charge shall be read to him (in the High Court) but he shall not be called upon to plead and the provisions of the law for the time being in force relating to criminal procedure (in this example, in the High Court) shall be modified accordingly.

[14] At this juncture it is salutary to remember *Perumal v. Public Prosecutor* [1970] 2 MLJ 265 where the Federal Court ruled that a prosecution is instituted only when the accused is called upon to plead to the charge.

> But we agree that the proviso to subsection (1) and the new subsection (2) of section 26 of the Act limit the meaning of the phrase "institution of prosecution" and for the purposes of this section a prosecution is instituted when the accused is called upon to plead to the charge. In other words, irrespective of what happened prior to that stage, **there must be a consent of the Public Prosecutor when the accused is called upon to plead.** (emphasis added)

[15] Magistrates should take note that in respect of an offence under s. 39B(1)(a) DDA an accused can only be called upon to plead to the charge at his trial in the High Court.

[16] I cannot over-emphasize that at no stage should the DPP be heard to say that the chemist report is not available and yet frame a charge under s. 39B(1)(a) DDA!!. If the DPP finds himself in such an embarrassing situation in the High Court then he should unhesitatingly seek solace in the provisions of s. 254 CPC and inform the court he declines to further prosecute the said charge.

[17] Section 41A(1) DDA should be read independently of s. 39B(3) and s. 39B(4) DDA.

[18] It is significant to note the word "Court" and not "subordinate court" is used in s. 39B(4) DDA, in the sentence:

> (4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, ...

which is without doubt a reference to both the High Court as well as the subordinate court, whereas in s. 41A(1) DDA the word used is "subordinate court" in the sentence:

> (1) ... the accused person shall be produced before the appropriate **subordinate court** which shall, after the charge has been explained to him, transmit the case to the High Court ... (emphasis added)

[19] Upon a perusal of the record of proceedings of the magistrate it is patently clear that the DPP had framed a baseless charge on 29 January 2007, when he was not in a position to determine an appropriate charge, because investigations were incomplete by reason of the absence of a chemist report. In such

an unequivocal situation, the magistrate should not transmit the case to the High Court under s. 41A(1) DDA but, instead, release the accused under s. 29 CPC. It would be unlawful for the magistrate to remand the accused for two months or any other period to enable the DPP to obtain the chemist report, and only thereafter for the DPP to ascertain the "proper charge" against the accused.

[20] A magistrate should not appear to be acting in collusion with the DPP when making any order for remanding an accused person. The appearance of a senior DPP before a magistrate should not intimidate the magistrate.

[21] In the above circumstances, the order of the learned magistrate Petaling Jaya in Kes Jenayah: M3-81-2-2007 made on 29 January 2007 remanding the accused till 29 March 2007 is set aside. The magistrate is directed to cause the accused to be produced before her forthwith and released under s. 29 CPC because the charge under s. 39B(1)(a) is baseless and the case cannot be remitted to the High Court for trial under s. 41A(1) DDA.